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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. SANBEIRA THLANG, Defendant and Appellant.	C089529 (Super. Ct. Nos. STKCRFE20050007223, SF095149F)

Defendant Sanbeira Thlang appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.95.[1] Defendant contends the court erred by summarily denying his petition after determining that he failed to establish a prima facie case that he fell within the provisions of the statute. He argues a trial court must appoint counsel and allow the parties to submit additional briefing before

[1] Undesignated statutory references are to the Penal Code.

making such a determination. We conclude the trial court did not err in summarily denying defendant's petition, and therefore affirm.

I. BACKGROUND

In 2006, a jury found defendant guilty of first degree murder (§§ 187, 189) and several lesser or related offenses to the murder, as to which sentencing was stayed under section 654. The jury also found true a special circumstances allegation that the murder was committed while actively participating in a criminal street gang (§ 190.2, subd. (a)(22)) and enhancement allegations that the death was caused by intentional discharge of a firearm (§ 12022.53, subds. (d), (e)(1)), that defendant had a prior serious felony conviction (§ 1170.12), and, as to the stayed offenses, that they were violent felonies committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). He was sentenced to state prison for life without parole and a consecutive term of 50 years to life. We affirmed the convictions on appeal but, due to sentencing error, we modified the judgment to reflect a sentence of life imprisonment with the possibility of parole with a minimum term of 25 years on the section 12022.53, subdivision (d) enhancement to count 1 and 10 years for the section 186.22, subdivision (b)(1)(C) enhancements on the stayed counts 2 and 3. (*People v. Thlang* (Dec. 10, 2007, C053540) [nonpub. opn.].)

As set forth in our opinion, the evidence introduced at trial demonstrated that defendant did not shoot the victim. In particular, S.C., age 13 at the time of the shooting, testified as follows: He was seated behind defendant in the Camaro, on the passenger side. He got out of the car and shot the victim. When he returned to the car, he handed the weapon back to defendant, who placed it under his seat. Before the vehicles commenced the fatal journey, he and the others had discussed looking for an enemy "slippin'," i.e., leaving himself vulnerable to attack. (*People v. Thlang, supra*, C053540, at p. 8.)

The jury was instructed on principles of aiding and abetting intended crimes as well as the natural and probable consequences doctrine. Under that doctrine, " ' "[a]

person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) " 'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*Id*. at p. 164.) As defendant notes, the jury instructions allowed him to be convicted of murder under the natural and probable consequences doctrine with shooting from a motor vehicle or the lesser offense of assault with a firearm as the target crime.

Senate Bill No. 1437 (2017-2018 Reg. Sess.), which became effective on January 1, 2019, was enacted "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) To accomplish this, the bill amended section 189 to limit liability under the felony murder doctrine and, as relevant to these proceedings, amended section 188 to provide: "Except as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Stats. 2018, ch. 1015, §§ 2-3.) "As a result, the natural and probable consequences doctrine can no longer be used to support a murder conviction. [Citations.] The change did not, however, alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.' [Citations.] One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he

or she was liable under the old law." (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135 (*Lewis*).)

Senate Bill No. 1437 also added section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to [s]ection 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

Under section 1170.95, subdivision (b)(1), the petition must include: "[a] declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)"; "[t]he superior court case number and year of the petitioner's conviction"; and "[w]hether the petitioner requests the appointment of counsel."

In 2019, defendant filed a form petition for resentencing under section 1170.95. In the petition, defendant declared that a complaint, information, or indictment had been filed against him that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine, and that he was convicted of first degree or second degree murder under the felony murder rule or the natural and probable consequences doctrine. According to the petition, he could not now be convicted of first or second degree murder based on the recent changes to sections 188 and 189. He requested that the court appoint him counsel.

The trial court denied the petition. The court found that the facts declared to in defendant's petition were not accurate, and he was not eligible for resentencing. The

court explained that, with respect to the special circumstance allegation under section 190.2, subdivision (a)(22), the jury was instructed: "If you decide that the defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of Killing by Criminal Street Gang Member, you must also decide whether the defendant acted with the intent to kill. [¶] In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor or a member of a conspiracy, the People must prove that the defendant acted with the intent to kill. [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstance of Killing by Criminal Street Gang Member to be true. If the People have not met this burden, you must find this special circumstance has not been proved true." As the trial court explained, by finding defendant guilty of first degree murder and the special circumstance under section 190.22, subdivision (a)(22), "the jury necessarily found, pursuant to the instructions, that [he] was an aider and abettor who acted with the specific intent to kill, rendering him ineligible for resentencing."

II. DISCUSSION

A. No Violation of Section 1170.95

Defendant contends the trial court erred by summarily denying his petition without following procedures that he claims section 1170.95 mandates. We disagree.

The parties' dispute turns on the meaning of section 1170.95, subdivision (c), which provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner

makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

In essence, the dispute is over whether section 1170.95, subdivision (c) provides for two determinations by the trial court, or one.[2] The parties agree that, as provided in the last sentence of subdivision (c), after an appointment of counsel and briefing, the court makes a determination whether the petitioner has made a prima facie showing that he or she is entitled to relief. The People argue that, additionally, the first sentence of subdivision (c) authorizes a trial court to determine whether a petitioner has made a prima facie showing that he or she falls within the provisions of section 1170.95 before appointing counsel and receiving briefing. Defendant argues the statute does not authorize courts to summarily deny petitions in this manner. The People have the better argument.

"It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) Interpreting the statute as defendant urges would render the first sentence of subdivision (c) mere surplusage.

Defendant argues that if the Legislature had intended to give trial courts the power to summarily deny petitions under section 1170.95 without first appointing counsel, it would have used permissive terms in the subsequent sentence: "If the petitioner has requested counsel, the court *shall* appoint counsel to represent the petitioner." (Italics added.) We disagree. The requirement to appointment counsel is not discretionary; it is

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[2] Another review is provided for in section 1170.95, subdivision (b)(2). If any of the information required by subdivision (b)(1) "is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2).)

mandatory, but it does not arise until the petitioner has first made a prima facie showing that he or she falls within the provisions of section 1170.95. When interpreting statutory language, we do not examine language in isolation but consider it in the context of the statutory framework as a whole. (*Bruns v. E-Commerce Exchange, Inc*. (2011) 51 Cal.4th 717, 724.) "When the statutory framework is, overall, chronological, courts will construe the timing of particular acts in relation to other acts according to their location within the statute; that is, actions described in the statute occur in the order they appear in the text." (*Lewis, supra,* 43 Cal.App.5th at pp. 1139-1140.) "The structure and grammar of this subdivision indicate the Legislature intended to create a chronological sequence." (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 332 (*Verdugo*).) Thus, "we construe the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95 subdivision (c); that is, after the court determines that the petitioner has made a prima facie showing that petitioner 'falls within the provisions' of the statute, and before the submission of written briefs and the court's determination whether petitioner has made 'a prima facie showing that he or she is entitled to relief.' (§ 1170.95, subd. (c).)" (*Lewis*, *supra*, at p. 1140.) "If, as here, the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed." (*Verdugo, supra,* at pp. 332-333.) Nor is briefing required.

Defendant asserts he met the threshold requirement for relief under section 1170.95 because he was convicted of murder after a trial in which the jury instructions allowed for a murder conviction under a natural and probable consequences theory. This assertion ignores the third requirement: "The petitioner could not be convicted of first or second degree murder because of changes to [s]ection 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).) We agree with those authorities that have concluded the trial court can consider the record of conviction in making its initial determination under section 1170.95, subdivision (c). (*Verdugo, supra,* 44 Cal.App.5th at p. 329-330;

Lewis, *supra*, 43 Cal.App.5th at p. 1137.) In defendant's case, summary dismissal of his petition was appropriate because the record of conviction showed that "[t]he issue whether defendant acted as a direct aider and abetter has . . . been litigated and finally decided against defendant. (See generally 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 208, pp. 683-684 [collateral estoppel applies in criminal cases].)" (*Lewis*, *supra*, at pp. 1138-1139.) As the trial court explained, by finding defendant guilty of first degree murder and the special circumstance under section 190.22, subdivision (a)(22), "the jury necessarily found, pursuant to the instructions, that [he] was an aider and abettor who acted with the specific intent to kill, rendering him ineligible for resentencing . . . ." "This finding directly refutes defendant's conclusory and unsupported statement in his petition that he [could not now be convicted of murder], and therefore justifies the summary denial of his petition . . . ." (*Lewis*, *supra*, at p. 1139.) No further briefing or evidence could aid the court in reaching this conclusion. Indeed, " 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, . . . when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief.' " (*Id.* at p. 1138.)

The trial court did not fail to follow the procedures mandated by section 1170.95.

B. No Constitutional Right to Counsel

Defendant also argues the trial court's ruling violated his federal constitutional rights to due process and the assistance of counsel. We disagree. As we have discussed, section 1170.95 confers no right to counsel at this stage. Given the nature of the court's inquiry at this stage, neither does the federal constitution.

"A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, including sentencing." (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) " ' "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial

prejudice to defendant's rights inheres in the [particular] confrontation and the ability of counsel to help avoid that prejudice.' " [Citation.]' [Citation.] ' "[T]he essence of a 'critical stage' is . . . the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." ' " (*People v. Rouse* (2016) 245 Cal.App.4th 292, 297.)

Defendant's reliance on *People v. Rouse*, *supra*, 245 Cal.App.4th 292 is unavailing. The court in *Rouse* held that "when a defendant currently serving a felony sentence presents a petition [under Proposition 47] pursuant to section 1170.18, subdivision (a) and is found eligible for resentencing, that defendant is entitled to the assistance of counsel at resentencing in every case involving a judgment of conviction of more than one felony such that the court has discretion to restructure the sentence on all counts." (*Id*. at p. 301.) The court explained its view that "a resentencing hearing on a petition under section 1170.18, subdivision (a), under the circumstances of this case, is akin to a plenary sentencing hearing" and "properly characterized as a 'critical stage' in the criminal process to which the right to counsel attaches." (*Rouse, supra*, at pp. 299, 300.) The court explained that even if it "were to assume the right to counsel does not emanate from the Sixth Amendment since this is a postconviction proceeding, we still conclude defendant had a due process right to the assistance of counsel at his resentencing in this case." (*Id*. at p. 300.) *Rouse* is explicitly inapplicable to this proceeding. The court emphasized: "To be clear, we conclude the right attaches only at the resentencing stage. Whether the right to counsel attaches at an earlier stage of the petition, including the eligibility phase, was not before us and we therefore express no opinion on that issue." (*Id*. at p. 301; see also *People v. Washington* (2018) 23 Cal.App.5th 948, 957 [indicating right to counsel attaches at evidentiary hearing under Proposition 47].) Here, defendant's petition did not make even a prima facie showing of eligibility, and he cites no authority suggesting there is a right to counsel at a point analogous to the court's determination at the first step of section 1170.95, subdivision (c).

"The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo, supra,* 44 Cal.App.5th at p. 329.) This could not be a critical proceeding because it presents a purely legal question to which the presence of counsel would not contribute. (See *People v. Simms* (2018) 23 Cal.App.5th 987, 996.)

The trial court's summary denial of defendant's petition did not violate his constitutional rights.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

BLEASE, J.